BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LEVA BOHANAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 190, 281
USD 260	)	
Respondent	)	
AND	)	
	)	
KS ASSOC OF SCHOOL BOARDS	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

On August 16, 1995, the applications of the respondent and the Kansas Workers Compensation Fund for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Shannon S. Krysl on March 22, 1995, came on for oral argument by telephone conference.

Appearances

Claimant appeared by and through her attorney, Dennis Phelps of Wichita, Kansas. Respondent and insurance carrier appeared by and through their attorney, Anton Andersen of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Vincent L. Bogart of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award of the Administrative Law Judge is herein adopted by the Appeals Board.

Stipulations

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) Claimant's average weekly wage;
(2) The nature and extent of claimant's injury and/or disability;
(3) Whether respondent, its insurance carrier and the Kansas Workers Compensation Fund are entitled to an offset pursuant to K.S.A. 44-501(h) for retirement benefits received by claimant.
(4) What, if any, is the liability of the Kansas Workers Compensation Fund?
(5) Whether the off-set allowed in K.S.A. 44-501(h) is unconstitutional;
(6) Whether the attorney fee limitations set forth in K.S.A. 44-536 are unconstitutional.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

The Appeals Board will first address the claimant's contention that K.S.A. 44-501(h) and K.S.A. 44-536 are unconstitutional. The Appeals Board has held in past cases that the Appeals Board is not a court of proper jurisdiction to decide the constitutionality of laws in the State of Kansas. A statute is presumed constitutional, and the Supreme Court has a duty to uphold the statute if there is any reasonable way to construe the statute as constitutionally valid. Baker v. List and Clark Construction Co., 222 Kan. 127, 563 P.2d 431 (1977). The Appeals Board shall proceed with the application of K.S.A. 44-501(h) and K.S.A. 44-536 as written until instructed otherwise by a court of competent jurisdiction.

Claimant is a fifty-nine (59) year old high school graduate with no additional training or education. She has spent the last fourteen (14) years working as a supply clerk and fifteen (15) years plus working as a bus driver for USD 260. During claimant's employment with the school district, she had several injuries for which medical treatment was provided. The claimant, however, missed no time from work for any of these injuries. Claimant has been treated for intermittent problems with her knees, back, neck and shoulders. Beginning in 1980 she began receiving chiropractic adjustments for muscle strain in the low back, neck and legs. None of the doctors ever rated claimant and claimant was never placed under permanent restrictions for any of these prior problems.

On July 1, 1993, claimant came under the work supervision of Mr. Dan Francis, who shortly thereafter modified claimant's job duties. Claimant's new duties required an increase in heavy lifting which, claimant advised, she was having difficulty performing. On October 13, 1993 while moving a seventy-five (75) pound file cabinet, claimant experienced a sharp pain in her low back, neck and shoulders. The problem was immediately reported to her supervisor and claimant was sent home. Claimant was able to continue with her bus driving duties although her responsibilities were somewhat modified by the respondent in an attempt to accommodate claimant's physical problems.

Claimant received medical care and ultimately came under treatment by Dr. Jane Drazek, a board-certified physical medicine specialist. Dr. Drazek diagnosed degenerative disc disease hastened by trauma and rated claimant at eight percent (8%) permanent partial impairment of function to the body as a whole pursuant to the American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition, Revised. Dr. Drazek opined that three (3%) or four percent (4%) of claimant's impairment was attributable to her prior reoccurring back problems but the majority of claimant's impairment was attributable to the October 1993 injury. Dr. Drazek restricted claimant from prolonged sitting, standing, bending or lifting and allowed no lifting greater than twenty-five (25) pounds and limited claimant's overhead reaching. The

restrictions placed upon her by Dr. Drazek restricted claimant from returning to work in the supply clerk position, but claimant was, with accommodation, able to continue working as a bus driver.

Claimant was placed in a temporary position as a parking lot attendant by respondent at the same rate of pay for six and one-half (6.5) hours per day. During the school year the claimant's supply clerk job generally required between six (6) and six and one-half (6.5) hours per day with her bus driving duties filling the remainder of the day. In the summertime the claimant's supply clerk job became a full-time position.

In May 1994, claimant was informed by Dr. Thomas Hightower, Director of Operations for USD 260, that the parking lot attendant position would most likely be eliminated by the school district at the end of the school year. Claimant, fifty-nine (59) years old and ineligible for social security retirement benefits, was concerned that she could not survive on the $119.50 per week wage from the bus driving position. Claimant was advised she might be eligible for early retirement which claimant reluctantly applied for and was granted. Claimant began receiving benefits from an early retirement insurance policy paid for by respondent. Claimant also began receiving benefits from KPERS. It is unclear from the record what percentage of KPERS payments are from claimant's contributions and what percentage are from contributions made by the respondent. On June 15, 1994, Dr. Hightower confirmed in writing the parking lot attendant position would no longer be available.

On September 30, 1994, respondent provided formal written notice to the claimant of potential employment as a study hall monitor in the middle school. The job required claimant monitor study hall for five (5) hours a day and work one (1) hour a day as a parking lot attendant. While claimant felt she could physically perform the job, she was concerned she did not have the educational qualifications to assist students with math and reading. Claimant had not attended high school in over forty (40) years and had no additional training since her high school graduation. In addition, the position offered to claimant was a nine (9) month rather than a twelve (12) month position which would leave claimant without income for three (3) months out of the year. When claimant talked to the middle school superintendent and the middle school principal, they expressed concern about claimant's qualifications for the position. Claimant did not accept the position and it was filled by the school district on October 12, 1994. Claimant has also been offered a position as a paraprofessional working with children with physical and mental disabilities. This job was deemed not appropriate for claimant given her medical restrictions.

Claimant was examined by Dr. Robert Eyster, a board-certified orthopedic surgeon, at the request of the respondent. Dr. Eyster reviewed claimant's medical reports but did not perform a physical examination. He diagnosed claimant as having degenerative disc disease but provided no rating or permanent restrictions. Dr. Eyster did opine that claimant's current problems are a manifestation of the same symptoms she was having in 1992, finding that claimant had sustained a temporary aggravation only. He felt claimant could perform the duties both as a bus driver and study hall monitor and also as a parking lot attendant. He did not disagree with Dr. Drazek's rating or restrictions although he felt claimant would have had the same rating in 1992.

Claimant was examined by Mr. Jerry Hardin June 10, 1994, for an evaluation regarding claimant's prior task analyses. Mr. Hardin found claimant to be capable of performing five (5) tasks out of the nine (9) tasks performed by claimant over the previous fifteen (15) years of employment. Dr. Drazek opined that the analysis provided by Mr. Hardin was appropriate. Dr. Drazek also felt that claimant would be capable of performing five (5) out of nine (9) pre-existing tasks resulting in a forty-four percent (44%) task loss.

The Appeals Board will first analyze claimant's average weekly wage. While working for the school district, claimant worked approximately six (6) hours per day making $9.55 per hour five (5) days per week as a supply clerk. In the summertime claimant would work as a supply

clerk eight (8) hours per day at $9.55 per hour. This would equate to a supply clerk wage of $286.50 per week while the school was in session and $382.00 per week during the summer. The Appeals Board finds, as claimant spent nine (9) months out of the year working as a supply clerk for six (6) hours a day and only three (3) months out of the year working as a supply clerk eight (8) hours per day, three-fourths (75%) of the wage emphasis should be placed on claimant's work during the school year. By adjusting the appropriate hourly rate times either six (6) or eight (8) hours per day, five (5) days per week, the Appeals Board finds claimant has an average weekly wage of $328.29 per week in the supply clerk position. Insurance benefits provided to claimant through the school district are still being provided to claimant through her school bus driver position. As such, additional fringe benefits would not be computed in claimant's average weekly wage unless or until they are discontinued. See K.S.A. 44-511. Vacation and sick leave are not listed in K.S.A. 44-511 as additional compensation and will not be included in the claimant's average weekly wage.

With regard to the nature and extent of claimant's injury and disability it should be noted that Dr. Drazek, the doctor with the most contact with the claimant, assessed claimant an eight percent (8%) functional impairment, opining three to four percent (3-4%) of that pre-existed the 1993 injury. The Appeals Board finds, per the stipulations of the parties that claimant is entitled to an eight percent (8%) functional impairment as a result of the injuries suffered on October 13, 1993.

Claimant is not engaging in work for wages equal to ninety percent (90%) of the gross average weekly wage claimant was earning at the time of the injury. This entitles claimant to permanent partial general disability compensation in excess of her functional impairment. K.S.A. 44-510e(a) states in part:

> "Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."

The only evidence discussing the claimant's loss of task performing ability comes from Mr. Jerry Hardin and Dr. Jane Drazek. Dr. Drazek, after reviewing the opinion of Mr. Hardin, agreed with Mr. Hardin's evaluation and, in adopting this opinion, found claimant capable of performing five (5) out of nine (9) pre-existing tasks. Dr. Drazek's analysis results in a forty-four percent (44%) task loss to the claimant as a result of the injuries suffered October 13, 1993. The Appeals Board finds the evidence in the record supports this task loss analysis and adopts same as its own.

After having concluded claimant has a $328.29 average weekly wage, the Appeals Board must next compare claimant's average weekly wage on the date of injury with the average weekly wage the claimant is earning after the injury. Claimant is incapable of returning to work as a supply clerk. The only wage claimant has the ability to earn is that of the bus driver which pays $119.50 per week. In comparing claimant's pre-existing average weekly wage of $328.29 as a supply clerk to claimant's current wage of $119.50, the Appeals Board finds claimant has suffered a difference of sixty-four percent (64%) between claimant's pre-injury and post-injury, average weekly wage.

K.S.A. 44-510e requires that once the loss of ability to perform work tasks is analyzed by the physician and the difference in pre-injury and post-injury earnings is computed, that these

numbers be averaged together in order to find claimant's appropriate work disability. Claimant's forty-four percent (44%) task loss, when averaged with claimant's sixty-four percent (64%) wage loss, results in a fifty-four percent (54%) permanent partial general body work disability from the injuries suffered October 13, 1993.

K.S.A. 44-501(c) states in part:

> "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Claimant was assessed an eight percent (8%) functional impairment by stipulation of the parties, and per the report of Dr. Drazek. In reaching this opinion, Dr. Drazek also concluded that claimant had a three to four percent (3-4%) pre-existing impairment from the claimant's earlier problems. The Appeals Board finds, pursuant to K.S.A. 44-501c, that the respondent is entitled to a reduction in claimant's work disability based upon a four percent (4%) pre-existing functional impairment. As such, claimant is awarded a fifty percent (50%) permanent partial general body work disability as a result of the injuries suffered October 13, 1993.

Respondent contends claimant is not entitled to a work disability due to the multitude of job offers made by respondent to claimant. It should be noted that, with the exception of the parking lot attendant job which claimant was advised would be eliminated at the end of the school year, claimant was offered no job which would pay her a comparable wage or ninety percent (90%) of a comparable wage for a twelve (12) month period. The only jobs evidenced in the record which would allow claimant to work a full twelve (12) months out of the year were janitorial jobs which were beyond claimant's physical ability to perform. As such the Appeals Board finds that claimant is entitled to work disability. The respondent's contention that Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), should apply to this matter is rejected.

K.S.A. 44-501(h) states:

> "If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment."

Respondent contends under K.S.A 44-501(h) entitlement to an offset equal to claimant's KPERS and early retirement benefits. As K.S.A. 44-501(h) requires any offset be based upon the amount of benefits provided by the employer and as there is no information in the record to indicate what percentage of claimant's KPERS benefits were provided by the employer, no offset can be allowed for this benefit.

The Administrative Law Judge, when entering the Award, granted the school district entitlement to an offset for early retirement benefits contributed by the respondent on behalf of the claimant. The Administrative Law Judge stated that the amounts of the offset had not been established, but once established would be allowed. However, the evidence in the record indicates at this time claimant is receiving retirement benefits in the amount of $244.75 per

month. This would equate to a weekly benefit of $56.48. The respondent would be entitled to an offset from claimant's award in said amount. Should claimant's retirement benefits decrease in the future, a likewise modification in respondent's entitlement to offset would be appropriate.

The Appeals Board must next decide what, if any, liability should be assessed to the Kansas Workers Compensation Fund. The purpose of the Kansas Workers Compensation Fund is to encourage employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(e); Blevins v. Buildex, Inc., 219 Kan. 485, 548 P.2d 765 (1976).

K.S.A. 44-567(b) provides in part:

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

The employer has the burden of proving that it knowingly hired or retained a handicapped employee. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Liability will be assessed against the Workers Compensation Fund when an employer shows that it knowingly hired or retained a handicapped employee who subsequently suffered a compensable work-related injury. An employee is handicapped under the act if that employee is inflicted with an impairment of such character as to constitute a handicap in obtaining or retaining employment. Carter v. Kansas Gas & Electric Co., 5 Kan. App. 2d 602, 621 P.2d 448 (1980).

In this instance, while claimant had experienced back problems in the past and had on several occasions obtained chiropractic treatment for her ongoing symptomatology, claimant returned to work after each occasion with no functional impairment and no physical restrictions until claimant's injury on October 13, 1993. The Appeals Board finds that the respondent has failed in its burden of proving that it retained a handicapped employee within the definition contained in K.S.A. 44-566(b). Absent a finding that claimant was handicapped prior to her injury on October 13, 1993, liability cannot be assessed against the Kansas Workers Compensation Fund in this matter. The Appeals Board finds the respondent has failed in its burden of proving its entitlement to an assessment of any portion of this Award against the Kansas Workers Compensation Fund.

The statute does not address how to calculate benefits payable for an injury when the disability rate changes for one injury. Such a change may occur from review and modification or as a part of the initial award when, for example, the claimant ceases to work or returns to work after being off for a period. The award may change from functional to work disability or vice versa. The wage prong of the work disability test and consequently the percentage of work disability may change. Under the pre-1993 calculation, a change in the disability rate meant a change in the weekly rate for the remaining weeks. The calculation used for injury after July 1, 1993 does not lend itself so easily to a change. Nevertheless, contrary to respondent's assertion in this case, the Appeals board concludes more than one disability rate may, in the circumstances alluded to above, be applicable to the same injury even under the "new act."

There are several possible methods for calculating the award when there is a change in the disability rate. After considering the various options, the Appeals Board concludes the most equitable method is to calculate the award, or recalculate the award if benefits have already been paid based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award.

If permanent partial benefits have previously been paid, based on a different rate of disability, respondent is entitled to a credit for those payments. If the rating goes down, as when the claimant returns to work after being off for a period of time, and the new calculation on the new rating results in fewer weeks than respondent has previously paid, respondent owes nothing more. If the disability rate goes up, as when the claimant is laid off, the new work disability rating is calculated based in 415 weeks (less deduction for temporary total paid over 15 weeks) and the number of weeks of permanent partial benefits paid based on the lower rating is credited against amounts due. The last disability rating or amounts already paid, if higher, become the ceiling on benefits awarded.

Alternatives to this method would include deduction of weeks paid or weeks elapsed from the date of injury from 415 weeks before applying the new percentage of disability to the number of weeks. These methods, however, produce erratic and sometimes inequitable results. The method adopted here, in our opinion, adheres most closely to the intended operation of the calculation as enacted.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl, dated March 22, 1995, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leva Bohanan, and against the respondent, U.S.D. 260 and its insurance carrier, Kansas Association of School Boards, for an accidental injury sustained on October 13, 1993 and based upon an average weekly wage of $328.29, for 16.14 weeks temporary total disability compensation at the rate of $218.87 or $3,532.56, followed by 16.55 weeks permanent partial disability compensation at the rate of $218.87 per week in the amount of $3,622.30 for a total of $7,154.86 for a 4% permanent partial general body disability through June 30, 1994, after which claimant is entitled to 190.38 weeks permanent partial general body disability at the rate of $218.87 per week totaling $41,668.47 for a total award of $48,823.33 for a 50% permanent partial general body work disability.

As of August 29, 1995, there would be due and owing to claimant 16.14 weeks temporary total disability compensation at the rate of $218.87 per week in the sum of $3,532.56 followed by 16.55 weeks permanent partial general body disability at the rate of $218.87 per week in the amount of $3,622.30, followed thereafter by 65.17 weeks permanent partial general body disability at the rate of $218.87 in the amount of $14,263.76 for a total of $21,418.62 which is due and owing in one lump sum minus amounts previously paid. Thereafter the remaining balance of $27,404.71 shall be paid at the rate of $218.87 for 125.21 weeks until fully paid or until further order of the Director. Respondent is entitled to an offset against the Award in an amount equivalent to the weekly benefits secured by claimant from her early retirement payments, with said amount of offset currently being $56.48 per week.

Claimant's contract of employment with counsel is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Deposition Services

Transcript of regular hearing	$636.90
Deposition of Robert L. Eyster, M.D.	$364.60
Deposition of Robert G. Gage, D.C.	$354.40

Ireland Court Reporting

Deposition of Jerry D. Hardin	$261.30
Deposition of Jane Drazek, M.D.	$273.10
Barber & Associates	
Deposition of Michael Redburn	$290.60
Deposition of Mary Anne Haga	$350.00
Deposition of Thomas Hightower	$579.00
Transcript of stipulations	$ 49.80

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis Phelps, Wichita, Kansas
Anton Andersen, Kansas City, Kansas
Vincent L. Bogart, Wichita, Kansas
Shannon S. Krysl, Administrative Law Judge
Philip S. Harness, Director